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Supreme Court of the United States

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October Term, 1968

No. [redacted] 98

LONG BEACH BANANA DISTRIBUTORS, INC., a California corporation, *et al.*, *Petitioners,*

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent.*

CONSOLIDATED PRODUCE CO., a California corporation, *et al.*, *Petitioners,*

vs.

PACIFIC ELECTRIC RAILWAY CO., *Respondent.*

EUGENE NELLA, SAM CANCILLA and DIEGO CANCILLA, dba BANANA KING, etc., *et al.*, *Petitioners,*

vs.

SOUTHERN PACIFIC COMPANY, *Respondent.*

Brief in Opposition to Petition for Writ of Certiorari.

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SOUTHERN PACIFIC COMPANY, *Respondent.*

Brief in Opposition to Petition for Writ of Certiorari.

To the Honorable Chief Justice and Association Justices of the Supreme Court of the United States:

Respondents accept Petitioners' Jurisdictional Statement, the recitation of the Statute Involved, the basis for Federal Jurisdiction Below, and the substantial accuracy of Appendices A and B to the Petition.[1]

[1]Some typographical errors appear in Appendix A, for which reason our references to the Opinion of the Court of Appeals will be both to 407 F. 2d 1173, and to pages 1-20 of the Appendix to the Petition for Certiorari. References to the trial court's Findings of Fact and Conclusion of Law will be both to pages 21-23 of said Appendix and to the Record.

We do not agree with Petitioners' Statement of the Case or their statement of the Question Presented; and for the several reasons hereinafter set forth, we do not agree that a review by this Court is either necessary or appropriate in the within cases.

Questions Presented.

Petitioners assert that "The question presented herein for review is whether or not the Court of Appeals was in error in overruling its prior decision in *Chicago, M. St. P. & P. Ry. v. Campbell River Mills Co.,* 9 Cir. 53 F. 2d 69." (Petition p. 2). So far as we can ascertain, the overruling by a Court of Appeals of one of its own prior decisions (decided 38 years before) is not a ground for review by this Court, particularly where, as here, the current decision was by the Court *en banc.* Hence, it would appear that on its face the petition is not well taken.

The true questions presented, as Respondents see it, are:

(1) Was the Court of Appeals correct in holding that the interstate and foreign commerce rates (rather than intrastate or local rates) applied to Respondents' carriage of the imported bananas from the ports of entry (Los Angeles or San Francisco) to other points within the state of California?

(2) Was the Court of Appeals' ruling contrary to any decision of any other Court of Appeals or of this Court?

Statement of the Case.

The facts of these cases are not in dispute, having been established by two written stipulations [R. pp. 29-38 and 147-149]. Such facts are accurately summarized in the Opinion of the Court of Appeals (App. pp. 1-6; 407 F. 2d 1173-1175). Nevertheless, a brief statement of the case appears to be in order.

The within actions are for a refund of a part of certain freight charges paid by Petitioners (banana wholesalers) to the Respondents (rail common carriers) for the rail movement of bananas wholly within California. The carriers charged rates applicable to intrastate or foreign commerce, whereas the Petitioners claim that intrastate or local rates should have been charged.

The bananas in question were grown in Costa Rica, Panama and Ecquador. It was stipulated that they "were imported from Central and South America through the ports of Los Angeles and San Francisco and moved beyond by defendant railroads to other points in California." [R. p. 29, lines 29-32].

The trial court found (and such findings are not attacked) that all parties intended from the time the bananas were grown on the farms that they were to be carried in the regular and usual course of business to inland points beyond the California ports of entry [Find. 4; App. p. 22; R. pp. 151-152], and that the bananas moved in a continuous movement from the interior of the foreign countries (where they were grown)

to points within the State of California [Find. 3; App. p. 22; R. p. 151].

The through movement from the inland points of Costa Rica, Panama and Ecquador to the inland points of California, although continuous, involved three legs or segments. The first leg, from the producing fields to the seaports of the foreign countries, was by various means, including "public service railroad", government owned railroad, "public carrier" railroad, "for hire" barge carriers, and trucks, some of the latter being "for hire" and some owned by the farmers [R. p. 30, line 26, to p. 31, line 7]. The second leg of the movement, across the high seas, was in chartered ships [R. p. 31, line 31, to p. 32, line 2], which ships included registries in six different countries [R. p. 148, line 6, to p. 149, line 19]. The third and final leg of the movement was from the ports of Los Angeles and San Francisco to interior points of California by the Respondents common carrier railroads.

Commencing in 1927, and continuing for more than 30 years, all parties treated the California rail movement as a part of foreign commerce and Respondent carriers charged the applicable rates filed with the Interstate Commerce Commission. However, in 1959, Petitioners changed their position and contended that the California portion of the movement was *intra*state and that the intrastate or local rates filed with the California Public Utilities Commission should apply. Petitioners' contention was based on the unique (and wholly unsupported) theory that since the immediately preceding high seas transportation had been made in chartered ships rather than by common carrier, no foreign

commerce within the meaning and intent of the interstate Commerce Act ever took place.

Accordingly, the ultimate issue presented to the courts below was:

> Was Respondents' rail movement of these import bananas from the ports of California to other points in California a part of a shipment from a foreign country so as to make the Interstate Commerce Act applicable, or was such movement merely an intrastate or local shipment?

The trial court found that the California rail movement was an inseparable part of foreign commerce [Finds. 5 and 6; App. p. 22; R. p. 152], held that under all of the circumstances present, it was immaterial whether the immediately preceding transportation over the high seas was by common carriage or chartered ship, and concluded that respondent carriers had acted properly in applying the rates filed with the Interstate Commerce Commission rather than the local rates filed with the California Public Utilities Commission [Conclusions of Law 1 and 2; App. p. 23; R. p. 152].

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. The cases were argued before a three judge panel and taken under submission. Thereafter, by the Court's own order, the cases were withdrawn from the three judge panel and set for hearing before the Court *en banc*. After hearing the matter *en banc*, the Court of Appeals by a unanimous decision affirmed the judgment of the District Court.

ARGUMENT.

(1) The Ruling of the Court of Appeals Was Correct and Is Fully in Accord With All Prior Decisions on the Same Subject by the Interstate Commerce Commission, Other Courts of Appeals and This Court.

Although not mentioned in their statement of "Question Presented" (Petition p. 2), Petitioners later argue (Petition p. 4) that the decision of the Court of Appeals below conflicts with a decision rendered by this Court in the case of *Pennsylvania Railroad v. Public Utility Comm. of Ohio,* (1936) 298 U.S. 170; 80 L. Ed. 1130. In that case, an owner of coal transported it *on its own railroad* from its mines in Pennsylvania to one of its plants in Ohio, where the coal was dumped from the cars, washed, and broken up or assorted into the sizes desired by customers. Then, for the first time it was tendered to a common carrier for movement to another point in Ohio. This Court held that the Ohio common carrier movement was not subject to the jurisdiction of the Interstate Commerce Commission because the prior carriage which brought the product across the state line from Pennsylvania into Ohio was by a strictly private carrier. Wholly aside from the fact that there was an obvious break in the continuity of the movement at the owner's Ohio plant, a reading of that case will demonstrate that there are several other reasons why it is neither controlling nor even pertinent to the cases at bar.

In the first place, the case dealt with strictly *private* carriage by the *owner* of the product. *No such factual situation appears in the cases at bar.*

In the second place, the decision was concerned *solely* with a determination of what constitutes *interstate* commerce. The question of what constitutes *foreign* commerce for the purpose of the Interstate Commerce Act was *not* involved. This important difference was noted by the Court of Appeals in the case at bar (App. pp. 14-15; 407 F. 2d 1173, at pp. 1179-1180).

Lastly, in distinguishing (from the cases then before it) two cases involving *foreign* commerce,[2] this Court, speaking through Justice Cardozo stated:

> ". . . Upon a shipment of merchandise to and from a *foreign* country, the Interstate Commerce Act *applies to the carriage in this country, though that part of the carriage is within the limits of a single state.*"
>
> *Penn. R.R. v. Public Util. Comm. of Ohio,* 298 U.S. 170, at 176.

Thus, the opinion in the *Pennsylvania Railroad* case expressly *excludes* any implication that it was intended to apply to *foreign* commerce.

The validity of the Opinion of the Court of Appeals in the three cases at bar is fully supported by many other decisions on the same subject matter. Thus, in at least three earlier reported decisions, the movement of imported bananas from United States points of entry to other points within the same state, has been held to be a part of foreign commerce and therefore subject to the jurisdiction of the Interstate Commerce Commission. In this connection, see:

> *Schuster's Wholesale Produce Co. v. Texas & P. Ry. Co.,* 145 So. 368, 369-371 (La. 1932-

[2] *United States v. Erie Railroad Co.,* (1929) 280 U.S. 98 and *Texas & NOR Co. v. Sabine Trans. Co.,* (1913) 227 U.S. 111.

1933) cert. denied May 1933, 289 U.S. 745; 77 L. Ed. 1491.

[Note that certiorari was denied by this Court some two years subsequent to the *Campbell River* case decision upon which Petitioners rely.]

Southern Produce Co. v. Denison & Pac. S. Ry. Co., (1930) 165 I.C.C. 423, at pp. 425, 428;[3]

United States v. Illinois Central R.R. Co., 230 Fed. 940, 941 (1916, E. D. Louisiana).

Each of the above three cases is on all fours with the present banana cases (except that the port of entry was either New Orleans or Galveston rather than Los Angeles or San Francisco), and sofar as we can ascertain, their soundness has never been heretofore questioned.

Similar movements of various other commodities within a state have likewise uniformly been held to be subject to the Interstate Commerce Act irrespective of the mode or type of transportation involved prior or subsequent to the products reaching the port of entry or exist. See, for example:

United States v. Erie Railroad Co., (1929) 280 U.S. 98, 74 L. Ed. 187;

Texas & N.O.R. Co. v. Sabine Trans. Co., (1913) 227 U.S. 111, 57 L. Ed. 442;

Railroad Commission of Ohio v. Worthington, (1912) 225 U.S. 101, 56 L. Ed. 1004;

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[3]It is significant that the I.C.C. reached its decision *after* specifically noting that ". . . Bananas are imported regularly and continuously throughout the year and reach the ports in cargo lots, ***usually in ships owned and operated by the producing and importing interests . . .***" (165 I.C.C. at p. 425)

Powell v. United States, (4th Cir. 1940) 112 F. 2d 764;

Tampa Fuel Co. v. A.C.L.R. Co., (1917) 43 I.C.C. 231, 232, 233;

Dupont v. Director General, (1922) 74 I.C.C. 191, 193;

Lake Cargo Coal Rates 1925, (1927) 126 I.C.C. 309, 314;

Hamilton Emery & Corundom Co. v. Boston & Albany R.R., (1932) 188 I.C.C. 409 at 410;

Osborne McMillan Elevator Co. v. Minn., (1959) 306 I.C.C. 155, 157, 158.

The foregoing twelve decisions of this and other Courts and of the Interstate Commerce Commission clearly demonstrate that the proper rule to be applied is that which was adopted by the Court of Appeals in these cases below, to wit, where an import or an export is involved, so long as the appropriate intent and continuous movement exists, and the origin of the product (in the case of imports) or the destination of the product (in the case of exports) is a foreign country, common carrier rail carriage of such product within the United States is a part of foreign commerce and subject to the Interstate Commerce Act.

(2) The Action of the Court of Appeals in Overruling One of Its Own Prior Decisions Was Proper.

As demonstrated above, the Court of Appeals correctly held that under the circumstances of these cases, the interstate or foreign rate was applicable to the Cali-

fornia movement of the imported bananas regardless of whether the immediately preceding waterborne carriage was by private, chartered or common carrier. Accordingly, it quite properly overruled its own 38 year old prior decision[4] insofar as said decision could be interpreted as requiring that the prior waterborne movement of bananas necessarily had to be by common carrier before the subsequent California rail movement could be held to be a part of foreign commerce. The reasons for such overruling are fully discussed in the Opinion of the Court of Appeals and we deem it unnecessary to further lengthen this brief by here restating such discussion. We are content to stand on the Opinion (App. pp. 6-12; 16-17; and 20; and 407 F. 2d 1173, at pp. 1176-1182).

Conclusion.

We are not aware of any decision, and Petitioners have cited no decision, by any United States Court of Appeals or by this Court which in any way suggests that in the case of either imports to or exports from a foreign country, the mode or character of the overseas carriage is in any way material. Such shipments have uniformly been held to constitute foreign commerce. As a result, subsequent shipments (in the case of imports) and prior shipments (in the case of exports) by rail common carrier within the United States are subject to the jurisdiction of the Interstate Com-

[4] *Chicago, M. St. P. & P. Ry. v. Campbell River Mills Co.*, (1931) 9 Cir. 53 F. 2d 69.

merce Commission, and the rates charged for those shipments are governed by the interstate tariff rates filed with the Commission.

The Petition for Certiorari should be denied.

Respectfully submitted,

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